IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 962 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL

HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BALLU ALIAS BALRAM SANTOSH KUMAR SONI - Appellant

Versus

STATE OF GUJARAT - Respondent

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Appearance :
MR I.M.Kapoor for MR RAJESH M AGRAWAL for Appellant.
MR ND GOHIL, A.P.P. for the respondent-State.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 30/08/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against

judgment dated August 28, 2000, rendered by the learned Additional Sessions Judge, Court No.16, in Sessions Case No. 161 of 1999, by which the appellant is convicted under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 [“the Act” for short] and sentenced to suffer R.I. for ten years and fine of Rs. 1 Lac, in default, R.I. for three months.

2. The facts emerging from the record of the case are as under :

On or about April 15, 1999, Mr.H.K.Chauhan was discharging duties as Police Inspector, Narcotic Cell of C.I.D. Crime, Ahmedabad. On April 15, 1999, he received an information from his informant that two persons, out of whom one was named as Balram @ Ballu Soni (appellant), who was well-built with wheatish complexion and wearing white jersey as well as jeans pant, and another person named Naresh Sindhi, wearing shirt having design and who was dark complexioned, were to come on a scooter from the direction of Hansol Police Chowky towards Talavadi Circle with brown-sugar and that the brown-sugar was concealed in the soles of chappals worn by them. On receipt of the information, Mr.Chauhan made necessary entry in the register and reported the same to his immediate official

superior. P.I. Mr.Chauhan requisitioned services of two panch-witnesses through Police Head Constable Mr.Shrimali. The panch-witnesses were made aware about the information received by Mr.Chauhan and first part of the panchnama was drawn in the office of Mr.Chauhan itself. Thereafter, members of the raiding party proceeded towards Hansol Road and maintained a watch on the road. At about 3.00 P.M. two persons, whose description was given in secret information were spotted coming on a scooter. The scooter was being driven by the appellant. The scooter was intercepted. On seeing police personnel, who were members of the raiding party, the pillion rider made his escape good. While making his escape good, he left his chappals at the spot. Mr.Chauhan conveyed to the appellant the information received by him and told him that it was necessary to search his person. Before effecting search of person of the appellant, Mr.Chauhan offered him that he could be searched in presence of a Gazetted Officer or a Magistrate, if so desired, but, the said offer was declined by the appellant. Therefore, his person was searched, but, from his person, nothing incriminating could be found. It may be stated that before proceeding to carry out raid, the raiding party had taken with it necessary articles, such as poker, twine, seal wax etc.

With the help of poker, soles of both the chappals put on by the appellant were opened. On opening the soles, it was found that in a small concealed chamber, a plastic bag containing powder was kept. The plastic bag containing powder was taken out. A little quantity of power was brought out to ascertain its nature. With the help of kit-box, it was prima-facie ascertained that the powder placed in the plastic bag was brown-sugar. Head Constable Mr.Pandav, who was one of the members of the raiding party, weighed the substances found, and its weight was found to be 320 Grams. Out of 320 Grams, sample of 10 Grams was prepared for the purpose of sending the same to F.S.L. for analysis, whereas sample of another 10 Grams was prepared and kept as reserve sample, and rest of the quantity of brown-sugar was kept in another plastic bag. All the three plastic bags were separately heat sealed. Each sample was thereafter wrapped in paper which was tied with a twine. After tying the packet, slip bearing signatures of panch-witnesses was affixed and again twine was applied. Thereafter, seal bearing impression of “P.I. N.D.P.S. G.S. C.I.D.Crime,Ahmedabad” was applied on each packet. Each chappal put on by the appellant was seized and separately sealed. The plastic bag from which the brown-sugar was found, was also separately seized and sealed, as it had

traces of brown-sugar. Thereafter, the scooter, which the appellant was riding, was also searched, but, nothing incriminating could be found from it. After search of scooter was over, two chappals left over at the spot by the accused, who had absconded, were searched. On opening the soles of both the chappals with the help of poker, it was found that the sole of each chappal was containing a bag in which brown-sugar was placed. Weight of brown-sugar found from the chappals , which were worn by the absconding accused, was found to be 220 Grams. Out of 220 Grams of brown-sugar, three samples were prepared and sealed as mentioned earlier. In this case also, each chappal was separately seized and sealed, whereas plastic bag having traces of brown-sugar was also seized and sealed. Mr.Chauhan demanded pass or permit authorising the appellant to possess brown-sugar, but, no such pass or permit could be produced by the appellant. Rest of the panchnama was drawn on the spot itself and the appellant was arrested. Mr.Chauhan served the appellant with the grounds of his arrest, and also intimated his wife that the appellant was arrested for commission of offence punishable under the provisions of the N.D.P.S.Act. Mr.Chauhan made report to his higher officer as required by Section 55 of the Act. P.I. Mr.Chauhan thereafter reduced his complaint into writing. He handed over his

complaint, panchnama, muddamal articles and the appellant to Mr.V.L.Chauhan, who was Police Inspector of Narcotic Cell. On the basis of complaint of Mr.H.K.Chauhan, C.R.No.II.5/99 against the appellant and absconding accused was registered, for commission of offence punishable under Section 21 of the N.D.P.S.Act. Mr.V.L.Chauhan investigated the complaint lodged by Mr.H.K.Chauhan. He recorded statements of those persons, who were found to be conversant with the facts of the case. He asked Head Constable Ambalal Shrimali to hand over muddamal articles to F.S.L. for analysis. Accordingly, Mr.Shrimali handed over four parcels to F.S.L. on April 16, 1999 for analysis. The report of analysis indicated that the samples analyzed were brown-sugar. On completion of investigation, the appellant was chargesheeted for commission of offence punishable under Section 21 of the N.D.P.S.Act, 1985, in the Court of learned Special Judge, Ahmedabad, where it was numbered as Sessions Case No.161 of 1999.

3. The learned Additional Sessions Judge, to whom the case was made over for trial, framed necessary charge against the appellant at Exh.1. It was read over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore,

examined, (1) panch Shantilal Budhalal Solanki as PW.1 at Exh.7, (2) P.I. Hasmukhbhai Keshavbhai Chauhan as PW.2 at Exh.10, (3) polie officer Vithaldas Badaji Pandav as PW.3 at Exh.24, (4) Police Constable Ambalal Govindbhai Shrimali as PW.4 at Exh.28, (5) Investigating Officer Mr.V.L.Chauhan as PW.5 at Exh.32, to prove its case against the appellant. The prosecution also produced documentary evidence, such as report dated April 15, 1999 forwarded by Police Inspector to Superintendent of Police, Narcotic Cell as required by Section 42 of the Act at Exh.11, complaint lodged by Mr.Chauhan at Exh.12, memorandum containing grounds of arrest which was served on the appellant at Exh.13, intimation by P.I. State Narcotic Cell to P.I.Mr.V.L.Chauhan of State Narcotic Cell to register offence at Exh.14, panchnama indicating search of soles of chappals of the appellant as well as absconding accused as well as scooter and seizure of brown-sugar at Exh.15, intimation served on the appellant that he was arrested for commission of offence under Section 21 of the Act at Exh.16, seizure-memo served on the appellant at Exh.17, report under Section 55 made by P.I. Mr.H.K.Chauhan to Superintendent of Police after raid was over at Exh.18, report indicating that co.accused Naresh is absconding at Exh.25, receipt issued by F.S.L.for having received muddamal for analysis at

Exh.29, intimation by P.I. Mr.V.L.Chauhan to R.T.O. to inform as to in whose name Scooter bearing registration No.GJ-1-AS-8962 was registered at Exh.33, report of analysis at Exh.35, intimation given by P.I. Mr.V.L.Chauhan to Khimiyaben Balram Santoshkumar i.e. Wife of the appellant, by which she was informed that her husband was arrested for commission of offence under the N.D.P.S.Act at Exh.37 etc. in support of its case against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, the appellant claimed that he was working in a Garage and was picked up by police form his house when he was eating, and that he was quite innocent. He did not adduce defence evidence, but, produced his written statement at Exh.41 for consideration of the Court.

5. On appreciation of evidence produced by the prosecution, the learned Judge held that it was proved that muddamal articles being A, A1, A2, A3 and A4 contained brown-sugar and were found from the possession

of the appellant on the date, time and place mentioned in the charge. The learned Judge held that commission of offence punishable under Section 21 of the Act by the appellant was established. The learned Judge further concluded that requirements of Section 42(2), Section 50, Section 55, Section 57 of N.D.P.S.Act and Section 102(3) as well as Section 157 of the Code of Criminal Procedure, 1973 were complied with. In view of abovereferredto conclusions, the learned Judge has convicted the appellant under Section 21 of the Act and imposed sentence referred to earlier, vide judgment dated August 28, 2000, giving rise to instant appeal.

6. Mr.I.M.Kapoor, learned advocate appearing for Mr.R.M.Agrawal, learned advocate of the appellant, argued that panch Shantilal Budhalal Solanki, examined at Exh.7, does not state that any seal was applied on any of the muddamal articles, whereas testimony of P.I. Mr.H.K.Chauhan, who had carried out the raid, shows that seal bearing impression of “P.I. N.D.P.S. G.S. C.I.D.Crime Ahmedabad” was applied, and the report of F.S.L. shows that the sample was bearing impression of “P.I. N.D.P.S. C.I.D. Crime G.S. A'bad”, and as discrepancy regarding seal which was applied, is not explained by the prosecution, the appellant is entitled

to benefit of doubt. It was argued that police officer Mr.Pandav, whose testimony is recorded at Exh.24, has claimed that he had carried four samples to F.S.L. for analysis on April 16, 1999, whereas Police Head Constable Ambalal G.Shrimali, examined at Exh.28, also shows that he had carried four samples to F.S.L. for analysis on April 16, 1999, but, the report of F.S.L. indicates that only four samples were received by it for analysis and not eight as claimed by the witnesses and, therefore, also the appellant is entitled to acquittal. The learned counsel emphasised that neither it is referred to by any of the witnesses examined by the prosecution that an entry was made indicating handing over of muddamal, panchnama, complaint, accused etc. to P.I. Mr.V.L.Chauhan, nor any register is produced to indicate that abovereferredto articles with accused were handed over to Mr.V.L.Chauhan, which makes the prosecution case highly doubtful and, therefore, impugned judgment should be reversed. It was argued that residue of brown-sugar was not produced before the Court, as a result of which the Court was deprived of the opportunity to ascertain whether the samples forwarded to F.S.L. formed part of residue, which was kept after raid was over and, therefore, also the appellant is entitled to acquittal. The learned counsel of the appellant submitted that the

evidence on record is not appreciated by the learned Judge of the trial Court in its true perspective and, therefore, the appeal should be allowed.

7. Mr.N.D.Gohil, learned A.P.P. for the State, contended that some discrepancy in describing the seal which was applied on muddamal would not indicate that seal as claimed by P.I. Mr.H.K.Chauhan was not applied on the samples and, therefore, so-called discrepancy in seal applied on the samples would not entitle the appellant to benefit of any doubt, more particularly when seals on the samples were found to be intact by the F.S.L. The learned A.P.P. emphasised that non-production of register indicating handing over of muddamal, panchnama, complaint, accused etc. to P.I. Mr.V.L.Chauhan is of no consequence, when the said fact stands satisfactorily established from the testimony of P.I. Mr.H.K.Chauhan and that of Mr.V.L.Chauhan. It was argued that after the articles including muddamal were handed over to P.I. Mr.V.L.Chauhan, the same were forwarded to F.S.L. through police constable Ambalal Shrimali, which is quite evident from the testimony of Mr.Shrimali recorded at Exh.28 and therefore, non-production of residue before Court has no vitiating effect on the prosecution case at all. The learned counsel further pointed out that though it is

claimed by witness Pandav that he had also handed over four parcels to F.S.L. for analysis, in fact, the parcels were handed over to F.S.L. by police constable Mr.Shrimali and, therefore, it is wrong to contend that parcels seized were not handed over to F.S.L. and that the appellant is entitled to acquittal. The learned counsel of the State Government stressed that cogent and convincing reasons have been assigned by the learned Judge of the trial Court for convicting the appellant under Section 21 of the N.D.P.S.Act, and as the learned counsel of the appellant has failed to dislodge those weighty reasons, the appeal, which lacks merits, should be dismissed.

8. This Court has heard Mr.I.M.Kapoor, learned counsel of the appellant and Mr.N.D.Gohil, learned counsel of the State Government, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. As far as plea relating to discrepancy in seal applied on the samples is concerned, this Court finds that panch Shantilal Budhalal Solanki, who has supported

the prosecution, and whose testimony is recorded at Exh.7, has not stated that any seal was applied on any of the samples at all. P.I. Mr.H.K.Chauhan has stated that on the samples, which were prepared from the quantity of brown-sugar found from the possession of the appellant as well as chappals worn by him and two empty bags, seal bearing impression of “P.I. N.D.P.S. G.S. C.I.D.Crime Ahmedabad” was applied. His evidence further shows that on muddamal prepared from the quantity of brown-sugar found from soles of chappals, which were left at the place by the absconding accused and the other articles, seal bearing impression of “P.I. N.D.P.S. G.S. C.I.D.Crime Ahmedabad” was applied. Mr.Pandav, whose testimony is recorded at Exh.24, has stated that seal bearing impression of “P.I. N.D.P.S. G.S. C.I.D.Crime” was applied on muddamal of brown-sugar which was found from the possession of the appellant, whereas seal bearing impression of “P.I. N.D.P.S. C.I.D.Crime Ahmedabad” was used for the purpose of sealing the samples of muddamal articles which were prepared from the brown-sugar found from the soles of chappals left over by the absconding accused. Again, in the complaint it is mentioned that seal bearing impression of “P.I. N.D.P.S. G.S. C.I.D.Crime Ahmedabad” was applied on all the samples, whereas panchnama produced on record at

Exh.15 indicates that seal bearing impression of “P.I. N.D.P.S. G.S. Ahmedabad C.I.D.Crime” was applied on all the articles. The forwarding letter produced at Exh.19 would indicate that on the muddamal of brown-sugar found from chappals of absconding accused and other articles, seal bearing impression of “P.I. N.D.P.S. C.I.D.Crime G.S. Ahmedabad” was applied. The report of analysis would indicate that four samples having seal bearing impression of “P.I. N.D.P.S. C.I.D.Crime G.S.Ahmedabad” were received. A scrutiny of evidence on record of the case makes it evident that there is discrepancy in evidence about the seal applied on the muddamal and other articles. This discrepancy is not explained by any of the witnesses examined by the prosecution. It is not satisfactorily explained as to which seal was applied on the muddamal brown-sugar found from possession of the appellant. Therefore, the case of the prosecution that brown-sugar was found from soles of chappals put on by the appellant becomes highly doubtful.

10. Police Officer Mr.V.B.Pandav, who is examined at Exh.24, has, in his examination-in-chief, asserted that his police statement was recorded by P.I. Mr.V.L.Chauhan on April 16,1999 and that on the next day he was handed over a form containing particulars as well as four

packets of muddamal to be handed over to F.S.L. and that he had accordingly handed over four packets to F.S.L. and shown receipt to Police Inspector. He has produced form containing particulars at Exh.19. Similarly, Police Head Constable Ambalal Shrimali, examined at Exh.21, has stated in his examination-in-chief that on April 16, 1999 he was handed over four sealed packets to be delivered to F.S.L. for analysis. He has produced order by which he was directed by Police Inspector to hand over muddamal articles to F.S.L. at Exh.30, which also includes the report made by him that the said order was complied with and that four samples were handed over to F.S.L. Thus, there is no manner of doubt that four samples were handed over by witness Mr.Pandav probably on April 17, 1999, whereas four samples were handed over by Police Constable Mr.Shrimali on April 16, 1999 to F.S.L. for analysis. However, the report of F.S.L. indicates that only four samples were received by it for analysis and not eight samples, as claimed by the witness. Under the circumstances, the Court is at loss to understand as to whether, the samples, which were prepared from brown-sugar found from the possession of the appellant, were, in fact, sent to F.S.L. for analysis. It is relevant to notice that the claim of P.I. Mr.H.K.Chauhan, examined at Exh.10, is that he had handed over muddamal articles,

panchnama, his complaint and accused to P.I. Mr.V.L.Chauhan, who is examined at Exh.32. However, P.I. Mr.V.L.Chauhan has not produced any register which would show that the abovereferredto articles with accused were handed over to him. Mr.V.L.Chauhan has tendered his evidence in a cursory manner. He has not stated that the muddamal was kept in safe-custody at the police station, nor has he stated that he had handed over the same to P.S.O. for safe-custody and the muddamal was kept in safe-custody by P.S.O. of Police Station. Non-production of (i) necessary register, and (ii) evidence indicating that muddamal was kept in safe-custody, prompts this Court to hold that it could not be established satisfactorily by the prosecution that muddamal was kept in safe-custody so as to rule out possibility of tampering with the same before it reached F.S.L. Further, in this case, residue found from chappals of the appellant is not produced before the Court and naturally, therefore, the Court is deprived of an opportunity of ascertaining whether the muddamal received back from F.S.L. formed part of residue or not.

11. In **Valsala v. State of Karala, AIR 1994 SC 117**, while acquitting the appellant, the Supreme Court has observed that when no evidence to show that article was

sealed and kept in proper custody in police station is produced, sending of the very article seized to chemical examiner becomes highly doubtful.

Again, in **Jitendra and another v. State of M.P. (2004)10 SCC 562**, the Supreme Court has held that non-production of seized drugs before trial Court is not a mere procedural irregularity and as it causes prejudice to the accused, the same is fatal to the prosecution case. What is ruled therein is that in the trial under N.D.P.S.Act it is necessary for the prosecution to establish by cogent evidence that the alleged quantities of narcotic drugs and psychotropic substance were seized from the possession of the accused. The Supreme Court has explained that the best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. The Supreme Court noticed in the said case that there was no explanation for failure to produce the same before trial Court. The Supreme Court has, therefore, held that mere oral evidence as to their features and production of panchnama would not discharge heavy burden which lies on the prosecution, particularly, where the offence is punishable with a stringent sentence as under the NDPS Act. After so holding, the Supreme Court allowed the

appeal filed by the convict. In this case also, best evidence is not produced by the prosecution before the trial Court and, therefore, also the appellant is entitled to benefit of doubt.

Again, **in State of Rajasthan vs. Gurmail Singh, (2005) 3 SCC 59**, it was claimed that seized articles were kept in malkhana, but malkhana register was not produced to prove that it was so kept in the malkhana till it was taken to Laboratory. Under the circumstances, the Supreme Court has held that loopholes in the prosecution case had rightly led the High Court to acquit the respondent.

12. Applying the principles laid down by the Supreme Court in the abovequoted decisions, to the facts of this case. this Court finds that (i) discrepancy regarding seals used while packing the samples , (ii) conflicting claims made by two witnesses that each of them had carried muddamal to F.S.L. for analysis, (iii) non-production of register indicating receipt of muddamal, panchnama, complaint etc. with the appellant to P.I. Mr.V.L.Chauhan, as well as non-production of evidence indicating that muddamal was kept in safe-custody, and (iv) non-production of residue before trial Court, would justify the Court to hold that the prosecution has not

proved its case against the appellant beyond reasonable doubt and that the appellant is entitled to reasonable benefit of doubt arising from the facts of the case. The appeal, therefore, deserves to be allowed.

For the foregoing reasons, the appeal succeeds. Judgment dated August 28, 2000 rendered by the learned Additional Sessions Judge, Court No.16, in Sessions Case No.161 of 1999 convicting the appellant under Section 21 of the N.D.P.S.Act, 1985 and sentencing him to R.I. for ten years and fine of Rs.1 Lac, in default, R.I. for three months is hereby set aside. Instead, the appellant is acquitted. The respondent is directed to forthwith release the appellant from Jail, unless his presence is needed with reference to any other case.

As another accused Naresh Sindhi is absconding since inception, muddamal articles are ordered to be preserved so that trial against him does not become infructuous.

[J.M.PANCHAL, J.]

[H.B.ANTANI, J.]

(patel)